Wong Teck Lim v Sim Lim Finance Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–25 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
22 MARCH 2001

Civil Procedure *— Reciprocal enforcement of judgments — Setting aside registration of foreign judgment — Allegation of no service of original process — Whether signing of guarantee providing for application of Singapore Law Society's Conditions of Sale meant that defendant had submitted to jurisdiction of Singapore court — Defendant was guarantor under loan agreement, whether could be included as a party to the suit — Supreme Court of Judicature Act 1969 (Singapore) s 16(1)(b)*

The appellant was one of the guarantors guaranteeing the repayment of a loan given to the first defendant, a company incorporated in Singapore. Clause 20 of the guarantee provided that 'the laws of Singapore Law Society's Conditions of Sale 1981 apply in the construction of this agreement'. The respondent had entered judgment against the appellant in the High Court of Singapore and proceeded to register the judgment in the High Court of Malaya under the Reciprocal Enforcement of Judgments Act 1958. The appellant took out a summons in chambers to set aside the order of the senior assistant registrar registering the Singapore judgment. The appellant's application was dismissed. His appeal to the judge was also dismissed. The reasons for applying to set aside the registration were stated in the affidavit affirmed by one Jeffrey ZK Wong who claimed to be the son of the appellant and authorized to affirm the affidavit on behalf of the appellant who was then away outstation. The reasons given were: (i) there was no due service of the originating process and the appellant was never served the writ of summons of the court of original jurisdiction; (ii) the appellant had not submitted to the jurisdiction of the High Court of Singapore; and (iii) the court of original jurisdiction had no jurisdiction over the appellant in view of s 16(1)(b) of the Supreme Court of Judicature Act 1969 (Singapore).

Held, dismissing the appeal:

(1) The statement of Jeffrey ZK Wong in his affidavit that there was no due service on the appellant could not be accepted because it was based on his belief only and he did not reveal how he came to his knowledge of this fact. In any event, the court found that appellant was duly served by way of substituted service (see p 26D, F).

(2) By executing the guarantee where cl 20 it was clear that at that time the appellant had submitted to the jurisdiction of the original court (see p 26H).

(3) The respondent, by virtue of s 16(1)(b) of the Singapore Act when it first sued the first defendant on the loan, was also entitled

to include and sue the appellant as one of the defendants because he was a guarantor to the loan upon which the action commenced (see p 30C–D).

[**Bahasa Malaysia summary**

Perayu merupakan salah seorang penjamin yang menjamin pembayaran semula satu pinjaman yang diberi kepada defendan pertama, satu syarikat yang diperbadankan di Singapura. Fasal 20 jaminan tersebut memperuntukkan bahawa 'undang-undang Syarat-Syarat Jualan 1981 Persatuan Undang-Undang Singapura dipakai dalam penggubalan perjanjian ini'. Responden telah mencatat penghakiman terhadap perayu di Mahkamah Tinggi Singapura dan terus mendaftarkan penghakiman tersebut di Mahkamah Tinggi Malaya di bawah Akta Penguatkuasa Salingan Hukuman 1958. Perayu mengeluarkan satu saman dalam kamar untuk mengetepikan perintah penolong kanan pendaftar yang mendaftar penghakiman Singapura tersebut. Permohonan perayu telah ditolak. Rayuannya kepada hakim juga ditolak. Sebab-sebab mengapa pendaftaran tersebut dipohon untuk diketepikan dinyatakan dalam afidavit yang diakui oleh seorang Jeffrey ZK Wong yang menuntut bahawa beliau adalah anak kepada perayu dan diberi kuasa mengakui afidavit tersebut bagi pihak perayu yang pada ketika itu berada di luar negeri. Sebab-sebab yang diberikan ialah: (i) tidak terdapat penyampaian wajar proses pemula dan perayu tidak pernah disampaikan writ saman mahkamah bidangkuasa asal; (ii) perayu belum menerima bidangkuasa Mahkamah Tinggi Singapura; dan (iii) mahkamah yang mempunyai bidangkuasa asal tiada bidangkuasa ke atas perayu menurut s 16(1)(b) Akta Mahkamah Agung Kehakiman 1969 (Singapura).

Diputuskan, menolak rayuan tersebut:

(1) Pernyataan Jeffrey ZK Wong dalam afidavitnya bahawa tiada terdapat penyampaian wajar kepada perayu tidak boleh diterima kerana ia hanya berdasarkan kepercayaannya dan beliau tidak mendedahkan bagaimana beliau mendapat tahu akan fakta ini. Dalam apa jua keadaan, mahkamah mendapati bahawa perayu mendapat penyampaian wajar melalui penyampaian ganti (lihat ms 26D, F).

(2) Dengan menyempurnakan jaminan di mana fasal 20 adalah jelas bahawa pada ketika itu perayu telah menerima bidangkuasa mahkamah asal (lihat ms 26H).

(3) Responden, menurut s 16(1)(b) Akta Singapura tersebut apabila beliau mula-mula mendakwa defendan pertama atas pinjaman tersebut, juga berhak menyertakan dan mendakwa perayu sebagai salah seorang defendan kerana beliau merupakan seorang

penjamin ke atas pinjaman yang menjadi asas tindakan tersebut (lihat ms 30C–D).]

Notes

For cases on reciprocal enforcement of judgments, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2637–2638 and 3931–3942.

Cases referred to

Bank of New Zealand v Wong Kee Tat [1990] 2 MLJ 435 (refd)
Blohn v Desser & Ors [1961] 3 All ER 1 (refd)
Malayan Banking Bhd v International Tin Council and another appeal [1989] 3 MLJ 286 (refd)
United Malayan Banking Corp Bhd v Soo Lean Tooi & Ors [1984] 1 MLJ 47 (refd)
United Overseas Bank Ltd v Tjong Tjui Njuk [1987] 2 MLJ 295 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(b)
Reciprocal Enforcement of Judgments Act 1958 s 5(1), (2), (a)(i)
Supreme Court of Judicature Act 1969 [Sing] s 16(1)(b)

Appeal from: Originating Summons No R8–24–31–1989 (High Court, Kuala Lumpur)

MS Murthi (*Murthi & Partners*) for the appellant.
Maniam Kuppusamy (*Skrine & Co*) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):**.** We have dismissed this appeal earlier and we now give our reasons for doing so.

In the present appeal, the respondent had, on 22 August 1988, entered judgment against the appellant in the High Court of the Republic of Singapore. On 11 April 1989, the respondent proceeded to register the judgment in the High Court of Malaya at Kuala Lumpur under the Reciprocal Enforcement of Judgments Act 1958 ('the Act'). The judgment obtained in the High Court of the Republic of Singapore was worded as follows:

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE
Suit No 43 of 1988
Between
Sim Lim Finance Ltd
… Plaintiffs
And
1 Phelim Investments Pte Ltd
2 Datok Wong Kee Tat
3 Wong Teck Lim

… Defendants

JUDGMENT
THE 22ND DAY OF AUGUST 1988

No appearance having been entered by the third defendant herein.

IT IS THIS DAY ADJUDGED that the third defendant do pay the plaintiffs:

(i) the sum of S$l,532,987.86;

(ii) interest at the rate of 18% per annum from 29 October 1987 till the 22 August 1988 amounting to S$226,042.21; and

(iii) S$l,071.

Dated 22 August 1988.

Sgd
ASSISTANT REGISTRAR
Entered this 22 August 1988.
Vol 403 p 112 at 3.10pm.

On 11 April 1989, the senior assistant registrar in the High Court of Malaya at Kuala Lumpur issued the following order:

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL APPEALS & MISCELLANEOUS APPLICATION)
ORIGINATING SUMMONS NO R8–24–31–89

In the matter of Reciprocal Enforcement of Judgments Act 1958

And

In the matter of a judgment of the High Court of the Republic of Singapore obtained in Suit No 43 of 1988 and dated 22 August 1988.

Between
Sim Lim Finance Ltd … Plaintiffs

And
1 Phelim Investments Pte Ltd
2 Datok Wong Kee Tat
3 Wong Teck Lim … Defendants

Between

Sim Lim Finance Ltd ... Plaintiffs

And

Wong Teck Lim … Defendant

Before the Senior Assistant Registrar, Encik Ahmad Zaidi Ibrahim

This 11th Day of April 1989 In Chambers

ORDER

Upon the application of Sim Lim Finance Ltd, the plaintiffs abovenamed and upon reading the ex parte originating summons dated 17 March 1989 and the affidavit of Teh Choo Thok affirmed on 21 February 1989 both filed herein and upon hearing Miss Yee Chooi Mee @ Josephine Yee Chooi Mee of counsel for the plaintiffs abovenamed IT IS ORDERED that the judgment dated 22 August 1988 of the High Court of the Republic of Singapore,

whereby it was adjudged that the abovenamed Wong Teck Lim, the defendant abovenamed do pay Sim Lim Finance Ltd, the plaintiffs abovenamed:

(1) The sum of Ringgit $2,055,260.95 (equivalent to S$1,598,181.14 at the exchange rate of S$100 to Ringgit $128.60 as at 22 August 1988);

(2) Further interest of 8%pa is payable on the judgment debt from 22 August 1988 until date of payment;

be registered as a judgment of the High Court in Malaya pursuant to the Reciprocal Enforcement of Judgments Act 1958 AND IT IS ORDERED that the abovenamed Wong Teck Lim be at liberty to set aside the said registration within fourteen (14) days after service upon him of notice of such registration pursuant to O 67 r 7 if he has grounds for doing so, and that execution upon the said judgment will not issue until after the expiration of that period or any extension of the period granted by the Court; or if an application be made to set aside the registration until such application has been disposed of AND IT IS LASTLY ORDERED that the said Wong Teck Lim do pay the costs of this application.

Dated the 11 April 1989.

Sgd
Senior Assistant Registrar
High Court, Kuala Lumpur.

The notice to the judgment debtor of the registration of the foreign judgment was issued on 14 April 1989 and addressed to the appellant. On 15 April 1991, the appellant took out a summons in chambers to set aside the order of the senior assistant registrar registering the Singapore judgment. This application was heard by the Deputy Registrar of the High Court, who on 20 July 1994 dismissed the appellant's application. The appellant then appealed to the judge. On 14 April 1997 the learned judge dismissed the appellant's appeal. Hence the present appeal.

The reasons for applying to set aside the registration were stated in the affidavit affirmed by one Jeffrey ZK Wong dated 12 April 1991. In that affidavit, he claimed to be the son of the appellant and was therefore authorized to affirm the affidavit on behalf of the appellant who was then away outstation. The relevant parts of the affidavit read as follows:

1 I am the son of the defendant and am authorized to affirm this affidavit on behalf of my father who is outstation at the moment. The facts deposed to herein are true to my personal knowledge save and except where the contrary is stated.

2 I am advised and duly believe that there was no due service of the originating process and my father was never served the writ of summons of the court of original jurisdiction.

3 Further it has to be stated that there has not been voluntary submission to the jurisdiction of the court of original jurisdiction.

4 I am advised and verily believe that the registration was done contrary to the Reciprocal Enforcement of Judgment Act 1958, and further the court of original jurisdiction has no jurisdiction over the defendant.

5 Further I am advised and verily believe that the enforcement of the judgment that would be contrary to public policy in Malaysia in that the

municipal laws of Singapore are being enforced through these proceedings. A

6 I would like to state that the notice of proceedings in Singapore was not received in time to give sufficient time to enable the defendants to defend the proceedings and that the defendant did not appear in the proceedings in Singapore.

7 Further the subject matter of the suit was a loan transaction calculated to defeat the operation of the provision of the Exchange Control Act of Malaysia and that procurement of the guarantee was not approved by the Controller of Foreign Exchange Malaysia. B

The respondent, in their affidavit in reply, stated:

3 With respect to para 1 thereof, the deponent has failed to exhibit a power of attorney or any other instrument authorizing him to affirm this affidavit and is put to strict proof thereof. As such I am advised that the affidavit should not be read in support of this application. C

4 As for para 3 of the said affidavit, the deponent has failed to inform the court as to the source of his advice and belief that the judgment debtor was not served with the writ of summons. Notwithstanding the above, I crave leave to refer to the affidavit of service of Foo Soon Kee Jimmy which endorses the fact of service in accordance with the law. Now produced and shown to me marked 'A-3' is the aforesaid affidavit. D

5 With respect to paras 3 to 6, the judgment creditor avers that:
(i) the court of original jurisdiction in Singapore has jurisdiction over the judgment debtor by virtue of the guarantee of the judgment debtor to the judgment creditor. Now produced and shown to me marked 'A-4' is a copy of the said guarantee. E
(ii) that the purpose of the Reciprocal Enforcement of Judgments Act is to enable foreign judgments of reciprocating countries to register their judgments in Malaysia to facilitate enforcement. The contention of contravention of public policy is baseless. F

6 As for para 7, I am advised by my solicitors, M/s Skrine & Co and do verily believe that the execution of the guarantee does not amount to a contravention of the Exchange Control Act of Malaysia.

The learned judge in dismissing the appeal found that the court of the original jurisdiction, ie the High Court of the Republic of Singapore had the jurisdiction on the appellant. The registration of its judgment in Singapore was in order and should not be set aside. G

Before us, learned counsel for the appellant submitted that the application to set aside the registration of the judgment is made under s 5(2)(a)(i) of the Act. Sections 5(1) and (2) of the Act provide: H

5 Cases in which registered judgments must, or may, be set aside

(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment —
(a) shall be set aside if the registering court is satisfied —
(i) that the judgment is not a judgment to which this Part applies or was registered in contravention of this Act; I
(ii) that the courts of the county of the original court had no jurisdiction in the circumstances of the case;

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) that the judgment was obtained by fraud;

(v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

(b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

(2) For the purposes of this section the courts of the country of the original court shall, subject to subsection (3), be deemed to have had jurisdiction —

(a) In the case of a judgment given in an action *in personam* —

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise that for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;

(ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court;

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court; and

(c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or (b), if the jurisdiction of the original court is recognized by the law of Malaysia.

Subsection (3) is not relevant for the purposes of the present appeal. Learned counsel for the appellant contended that the appellant is entitled to set aside the registration under s 5(1)(a)(iii) and s 5(2)(a)(i) of the Act. It was submitted that the appellant was not served with the writ of summons by the High Court of the Republic of Singapore. This was duly stated in para 2 of the affidavit of Jeffrey ZK Wong and the respondent did not reply to this.

Evidence in affidavit

Before dealing with this, the respondent raised the issue that the affidavit was not an affidavit affirmed by the appellant. The affidavit was purportedly affirmed by the son of the appellant but there was no evidence to show that the deponent was actually the son of the appellant. Secondly, there was no specific authorization by the appellant such as a power of attorney even though the deponent was his son. In our view there is nothing wrong for a person to file an affidavit as long as the statements contained in the affidavit are within his knowledge. It would be wrong if he swore an affidavit in respect of anything within the personal knowledge of another person unless he revealed how the fact came to his knowledge. As such, in our view, the statement in para 2 of the affidavit in support could not be accepted because it was based on his belief only. He did not reveal how he came to his knowledge of this fact. As such, this evidence could not be accepted and there is no necessity for the respondent to reply.

Notwithstanding the above, the respondent through the affidavit of Low Eng Loo had replied to this as found in para 4. In that it was revealed that personal service could not be effected on the appellant and for that reason the respondent applied for substituted service by way of advertisement in the Malaysian newspaper which was *The New Straits Times*. This was duly done on 20 July 1988. This can be seen from the affidavit of Foo Soon Kee and the exhibits attached thereon. It is clear to us that the appellant was duly served with the concurrent writ of summons by way of substituted service.

Non submission of jurisdiction

In the present appeal it was not disputed by the appellant that the cause of action arose from a guarantee dated 13 November 1985 whereby the appellant was one of the guarantors guaranteeing the repayment of a loan of RM4m given to the first defendant, Phelim Investments Pte Ltd, a company incorporated in Singapore. Clause 20 of the said guarantee provides as follows:

The laws of Singapore Law Society's Conditions of Sale, 1981 apply in the construction of this Agreement.

In our view, by executing the said guarantee where cl 20 had been clearly stated, it is clear to us that at that time the appellant had submitted to the jurisdiction of the original court. That guarantee being a continuing guarantee, the submission to jurisdiction continues. In *Blohn v Desser & Ors* [1961] 3 All ER 1, the defendant was a partner with her brother and sister

in a family business carried on in Vienna in which she was registered as a partner in the commercial register in Vienna. She resided in England and did not participate in the conduct or the profits of the business in Vienna. An Austrian court gave judgment in favour of the plaintiff against the partnership in respect of bills of exchange that the brother had accepted in the name and on behalf of the partnership. The brother at all times was a resident in Vienna and was the sole managing partner in the firm. Under Austrian law, a partnership is not a separate legal entity and a successful action against a partnership firm does not impose personal liability on any individual partner. To execute a judgment against the personal assets of any partner, a further action had to be brought against that partner himself. In such an action, the partner was estopped by the doctrine of res judicata from raising defences which could have been raised by the firm in the original action but was entitled to raise defences personal to himself or arising from matters subsequent to the judgment against the firm. In an action by the plaintiff in the English courts based on the Austrian judgment, it was held that the court of a foreign country had jurisdiction to entertain an action *in personam* against a debtor who did not reside physically in the country, but who, at the time of the action, was carrying on business through an agent resident in the country where the transaction was effected by the agent at his place of business; the Austrian court had, therefore, jurisdiction to entertain the action against the defendant on the bill of exchange, the jurisdiction resting on implied agreement of the defendant by conduct to submit to the jurisdiction of the Austrian court in respect of the transaction. Diplock J (as he then was) at p 4B said:

> In *Emanuel v Symon* [1908] 1 KB 302, Buckley LJ enumerated the five cases in which an English court would enforce a foreign judgment. His enumeration was as follows:
>
> > (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.
>
> There may be some doubt whether today it would be held that the jurisdiction exists in the first category of cases, but the other four cases have never been questioned. It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied.
>
> It seems to me, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made — that is to say, the public — to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at the place of business by that agent.

> While I do not accept that comity is the basis on which English courts recognise and enforce foreign judgments, for there are many instances in which English courts exercise jurisdiction in personam over non-resident foreigners, where they do not recognize a similar jurisdiction in a foreign court, it is to be observed that the English courts under RSC, O 48A r 1 do purport to exercise jurisdiction over non-resident foreign partners of partnership firms carrying on business at a place of business in England. I hold, therefore, in the absence of any binding authority on me, that the Commercial Court of Vienna had jurisdiction to entertain an action against the first defendant on the bill of exchange.

As such, in our view, the appellant when he signed the guarantee with the full knowledge of cl 20, he had submitted to the jurisdiction of the High Court of the Republic of Singapore.

The learned counsel for the appellant cited *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] 2 MLJ 295 to support his contention that since the appellant did not submit voluntarily to the jurisdiction of the High Court of the Republic of Singapore, that court had no jurisdiction over him. In that case, the judgment debtor sought an order to set aside the registration of a judgment obtained in the Supreme Court of Hong Kong and registered as a judgment in the High Court of Singapore. The judgment debtor and three others were ordered to pay the sum of HK$99,350.58. Service of the writ of summons was effected by inserting a true copy of the writ of summons enclosed in a sealed envelope duly addressed to the judgment debtor at his address in Hong Kong and inserting the sealed envelope through the letter box of the judgment debtor on 19 November 1985. The judgment debtor, a Singapore citizen and resident in Singapore claimed that she had left Singapore to stay in Brunei. She said she had no knowledge of the proceedings taken against her in Hong Kong and in Singapore and only found out about them sometime on 4 December 1986 when she returned to Singapore for a holiday. In his judgment, Chua J at p 298 said:

> Was the debtor duly served with the process of the original court? I find that she was not. The creditor has in fact not complied with the Rules of the Supreme Court of Hong Kong. Before the creditor can serve the writ on the debtor in the manner provided for by O 10 r 1(2)(b), the debtor must be within the jurisdiction of the original court. The evidence clearly is that the debtor was not within the jurisdiction of the original court at the time of the writ was purported to be served on the debtor under O 10 r 1(2)(b). The service is therefore bad.

It is clear to us that when the learned judge in that case allowed the debtor's application to set aside the registration he was influenced by the non service of the writ on the judgment debtor.

That is not the case in the present appeal. As we have stated above, it is clear to us that the service of the writ of summons on the appellant was properly done within the scope provided by the law. The substituted service was good and effective.

The next issue raised was whether submission to jurisdiction must be expressed or implied. This issue had not been conclusively decided. In *United Overseas Bank Ltd v Tjong Tjui Njuk* it was held that submissions

must be expressed. On the other hand, *Blohn v Desser* decided that submissions could be implied. Whatever it is, in the present appeal it is clear to us, by virtue of cl 20 of the guarantee, that the appellant had expressly submitted to the jurisdiction of the original court.

That being the case, we are of the view that there is no merit in the contention of the appellant that he had not submitted to the jurisdiction of the High Court of the Republic of Singapore.

Whether the High Court of the Republic of Singapore had jurisdiction on the appellant in view of s 16(1)(b) of the Supreme Court of Judicature Act 1969 (Singapore)

Prior to 1993, s 16(1)(b) of the Supreme Court of Judicature Act 1969 ('the Singapore Act') is somewhat similar to s 23(1)(b) of the Courts of Judicature Act 1964 ('the Malaysian Act'). Section 16(1) of the Singapore Act provides:

> The High Court shall have jurisdiction to try all proceedings where:
>
> (a) The cause of action arose in Singapore;
>
> (b) The defendant or one of several defendants resides or has his place of business or his property in Singapore;
>
> (c) The facts on which the proceedings are based exists or are alleged to have occurred in Singapore; or
>
> (d) Any land the ownership of which is disputed is situated in Singapore.

Now s 23(1) of the Malaysian Act provides:

> Civil jurisdiction — general
>
> (1) Subject to the limitations contained in Art 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose;
>
> (b) the defendant or one of several defendants resides or has his place of business;
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which 1 disputed is situated;
>
> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

After the present action had been instituted, s 16 of the Singapore Act was amended. This took place sometime in 1993. The new s 16(1) of the Singapore Act provides:

> Civil jurisdiction — general
>
> (1) The High Court shall have jurisdiction to hear and try any action personam where:
>
> (a) the defendant is served with a writ or other originating process —
>
> (i) in Singapore in the manner prescribed by Rules of Court; or

(ii) outside Singapore in the circumstances authorised by and in the manner prescribed by rules of court; or

(b) the defendant submits to the jurisdiction of the High Court.

Since the amendment took place after the present action had been instituted, the amendment would not affect the present appeal. The former s 16(1)(b) of the Singapore Act applies to the present appeal.

In the present appeal the appellant was one of the three defendants in the writ in the original court. As I have stated earlier, the first defendant was Phelim Investments Pte Ltd, a company incorporated in Singapore. That being the case, the plaintiff had every right to sue the first defendant. The first defendant was sued for a loan given to it by the plaintiff which is the respondent in the present appeal. The third defendant in that suit was the appellant and he was sued in his capacity as the guarantor of the said loan. It is clear to us that both of them were sued from the same transaction. In our view, the respondent in the present appeal by virtue of s 16(1)(b) of the Singapore Act when it sued the first defendant on the loan, is also entitled to include and sue the appellant as one of the defendants because he was a guarantor to the loan upon which the action commenced. In *United Malayan Banking Corp Bhd v Soo Lean Tooi & Ors* [1984] 1 MLJ 47, the plaintiffs on 8 July 1977 obtained a judgment from the High Court of Singapore whereby it was adjudged, inter alia, that the plaintiffs recover against the second defendant (the respondent in that proceedings) and two others, the sum of RM20,645.22 with interest. The plaintiffs then applied under s 4 of the Reciprocal Enforcement of Judgments Act 1958 to have the judgment against the respondent registered in Johor Bahru but only in respect of RM11,460.38 with interest. On registration thereof being granted, the respondent applied to set aside the said registration. Yusof Abdul Rashid J dismissed the application to set aside, where at p 48 he said:

> In my opinion it is the intention of the Legislature to confer jurisdiction in the High Court of Malaysia under s 23(1)(b) of Act 91 on a person who does not reside or has no place of business or has no property within the local jurisdiction of the said High Court if such person is one of several defendants who have sued where the other defendants are residing or have a place of business or have property within the local jurisdiction of the said High Court. Section 23(1)(b) of Act 91 would not have been worded so, had the intention of the Legislature been different. Should the words 'one of several defendants' been omitted, then the High Court would not have jurisdiction on a person who is one several defendants and who does nor reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of s 23(1)(b) of Act 91 are in pari materia with the provisions of s 16(1)(b) of the Singapore Act, the latter provisions should admit the same construction.

This decision was cited with approval by the former Supreme Court of Malaysia in *Malayan Banking Bhd v International Tin Council and another appeal* [1989] 3 MLJ 286. At pp 288–289 Mohamed Azmi SCJ, delivering the judgment of the court, said:

> In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O 11 r 1, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corp Bhd v Soo Lean Tooi & Ors* where the late Yusuf Abdul Rashid had expressed the following opinion on s 23(1)(b).

His Lordship Mohamed Azmi SCJ then cited the passage I have cited earlier. His Lordship went on to express the followings:

> In interpreting s 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt here that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia. As stated by Lord Halsbury LC in the *Salomon v Salomon* [1897] AC 22 at p 29, the court has no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the Act itself. The provision of s 23(1)(b) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction. ....

In *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435, the court dismissed an application by the defendant to set aside the registration of a Singapore judgment. Eusoff Chin J (the Chief Justice of the Federal Court then) at p 437 said:

> I find that the defendant had been properly served with the notice of the concurrent writ on 6 May 1988. If he had wanted to enter appearance within 21 days of the date of that service, the last day would have been 27 May 1988. The defendant did not avail himself of this opportunity to enter an appearance and file his defence against the claim. His reason is that the original court had no jurisdiction over him. The question of jurisdiction had been dealt with in a similar case by Yusof Abdul Rashid J in *UMBC Bhd v Soo Lean Tooi & Ors*. There, the learned judge held that s l6(l) of the Supreme Court of Judicature Act 1969 [Sing] conferred jurisdiction on the High Court of Singapore to try all civil proceedings where one of several — defendants resided or had his place of business in Singapore. In Malaysia, s 23(1) (b) of the courts of Judicature Act 1964 has similar provision as that of the Singapore law. In *Malayan Banking Bhd v International Tin Council*, the Supreme Court decided that the High Court in Malaysia has jurisdiction to try civil proceedings where one of several defendants resides in this country, and the High Court may give leave to issue and serve out of jurisdiction, a notice of concurrent writ of summons on a co-defendant residing in London. Further, the Supreme Court held that service is not the sole foundation of jurisdiction of our High Courts.

Further down his Lordship said:

> In *Pemberton v Hughes* [1899] 1 Ch 782, the plaint claimed her share of property from the estate of her deceased husband. The other beneficiary alleged that the plaintiff was not legally divorced by her former husband before

she married the deceased because the writ of subpoena for the divorce proceedings issued by the Florida court did not comply with the rules of the Florida court. The rules there provided that the time for appearance must not be less than ten clear days from the date of the issue of the writ. The writ only gave nine clear days. Because of this irregularity, it was argued that the whole of subsequent proceedings was rendered null and void, and therefore the decree for divorce was of no effect whatever. Consequently the plaintiff could not marry the deceased. The High Court came to the conclusion that this defect went to the root of the jurisdiction of the Florida court and was fatal to the validity of the divorce. On appeal, the Court of Appeal held:

> 'Here it is alleged there was no proper service. The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of process, but no knowledge of it. The allegation of no service alone would not in such a case avail the defendant.'

As stated earlier, there is no doubt that the defendant was subject to the jurisdiction of the original court. He had been served with notice of concurrent writ to enter an appearance in the original court. He had been given an opportunity of having a hearing in the original court. He could have entered a conditional appearance and challenged the jurisdiction of the original court. But he had deliberately refused to exercise that opportunity.

This case is directly on point with the present appeal and the principle stated therein is applicable to the present appeal. In the present appeal, it is clear to us that the appellant was duly served with notice of concurrent writ.

As pointed out above, the appellant did not file any affidavit. It was his son who filed the affidavit. It is clear from that affidavit that the son based the non-service on his own belief and not from the knowledge of the father who was the one served. Further, from the affidavit it is apparent to us that he was a citizen and resident of the United States of America. That being the case, there was a good possibility that when the advertisement in the *New Straits Times* appeared in respect of the notice of concurrent writ he was not in Malaysia. In our view, the appellant must satisfy us by evidence that he did not see the advertisement and give good reasons why he did not see it. As stated by his Lordship Eusoff Chin CJ in *Bank of New Zealand v Wong Kee Tat*, the appellant lost his opportunity to challenge the judgment of the original court. In our view, there is no merit in the submission of the appellant to set aside the registration.

As can be seen from the authorities cited above, the question of voluntary submission to jurisdiction or not is not the issue in the present appeal. The issue is whether the appellant came within the jurisdiction of the original court or not. In our view, the appellant was within the jurisdiction of the original court. It is clear to us the appellant was one of the three defendants in the original court. It is also clear to us that the first defendant was within the jurisdiction of the original court because of the

loan transaction, the appellant being the guarantor of the said loan and being named as the third defendant in a suit in respect of the said loan came within the jurisdiction of the original court by virtue of s 16(1)(b) of the Singapore Act.

Loan transaction was invalid

The last ground to set aside the registration as stated in the affidavit was that the loan transaction was calculated to defeat the provision of the Exchange Control Act of Malaysia and that procurement of the guarantee was not approved by the Controller of Foreign Exchange Malaysia. It was submitted that the loan transaction and the guarantee were invalid for illegality. From my records, this point was not raised before us, but was raised in the court below. Whatever it is, the answer to this issue is found in *Bank of New Zealand v Wong Kee Tat*, where at p 437 the learned Chief Justice said:

> As regards the allegation that the borrowing had been transacted without the permission of the Controller of Foreign Exchange ('Controller') and therefore in contravention of s 4 of the Exchange Control Act 1953 ('the Act') and consequently it was void for illegality, this issue had been dealt with by Shankar J in *Bumiputra (M) Finance v Datuk Syed Kechik & Ors* in Kuala Lumpur Civil Suit No C23-1989-86. (unreported) I agree with the views held by him that the borrowing does not make the act illegal by virtue of s 36 of the Act. Further, the non-obtainment of permission of the Controller before the borrowing puts the borrower or lender to risk of being prosecuted and sentenced under para 7 Part II of the First Schedule to the Act.
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> It was also held in *Contract and Trading Co (Southern) Ltd v Barbey & Ors* [1960] AC 244; [1959] 3 All ER 846 that the Exchange Control Act 1974 does not provide a moratorium for debtors but controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court; thus discharging the debtor, and the fund itself remains out of the control of the creditor until consent had been obtained.

Conclusion

For the reasons we have stated above, it is clear to us that there is no merit in the submissions and the issues raised by the appellant. We were even of the view that there was no necessity for the respondent to reply. That being the case, there is no basis to set aside the registration of the judgment. The appeal is hereby dismissed with costs. The deposit is to be paid to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar